



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

September 16, 2014

Mr. Joseph Martens, Commissioner
NYS Department of Environmental Conservation
625 Broadway
Albany, New York 12233-1011

Mr. Matthew J. Driscoll
President and CEO
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625 Broadway
Albany, NY 12207-2997

Dear Commissioner Martens and Mr. Driscoll:

The State of New York has long been a leader in the national Clean Water State Revolving Fund (CWSRF) program. The New York State Department of Environmental Conservation (NYSDEC) and the New York State Environmental Facilities Corporation (NYSEFC) have promoted effective programs and have developed and implemented numerous financing packages that have significantly reduced the amount of inadequately treated sewage entering New York State waterbodies. The United States Environmental Protection Agency (EPA) values the role that the NYSEFC and the NYSEFC have played in implementing the CWSRF in such an effective manner. EPA has carefully considered the proposal by NYSEFC to fund various projects related to a major transportation construction project, the replacement of the Tappan Zee Bridge, using money from the CWSRF.

As you know, Clean Water Act (CWA) Section 603(c)(3) authorizes CWSRF funding to develop and implement a conservation and management plan developed pursuant to CWA Section 320. CWA Section 320 sets forth the requirements for developing a conservation and management plan for a national estuary. The plan is to recommend priority corrective actions and compliance schedules addressing point and nonpoint sources of pollution. These priority corrective actions and compliance schedules have two objectives: (1) to restore and maintain the chemical, physical, and biological integrity of the estuary, including restoration and maintenance of (a) water quality, (b) a balanced indigenous population of shellfish, fish and wildlife, and (c) recreational activities in the estuary; and (2) to assure that the designated uses of the estuary are protected.

The focus of corrective actions and compliance schedules in a conservation and management plan is, therefore, water quality-based and not for the mitigation of impacts directly caused by major construction projects – such as the replacement of the Tappan Zee Bridge – within an estuary. EPA recognizes the State's commitment to replacing the bridge and that federal loan dollars have been provided by the Department of Transportation. However, construction activities arising from transportation projects do not advance water quality, and CWSRF funding should not be used for these purposes. New York's request presents a unique circumstance that is unprecedented in the context of the CWSRF; no other state has made a request of this type or magnitude. The CWSRF exists to fund

projects pursuant to Sections 212 (construction of publicly owned treatment works) and 319 (nonpoint source pollution management), as well as for estuary programs pursuant to Section 320 of the Clean Water Act. Projects pursuant to CWA Section 212 are generally extremely costly – as evidenced by the 2008 NYSDEC report entitled Wastewater Infrastructure Needs of New York State, which projected a need for over \$36 billion dollars for New York State local governments by 2028. Curtailing the use of the CWSRF funding mechanism for new and improved sewage treatment plants may have an adverse impact on public health and the environment. There is no evidence in CWA Sections 320(b)(4), 601(a)(2), or 603(c)(3) that the CWSRF was intended to fund mitigation for major construction projects within an estuary.

EPA has carefully considered the detailed descriptions of each of the projects as set forth in the document prepared by AKRF, Inc. for the New York State Thruway Authority, entitled “Water Quality Protection Elements of the NY Bridge Project” (May 2014) as well as further explanations of the projects in various letters and memoranda, including the May 28, 2014 letter from the NYSEFC to the EPA and Commissioner Joseph Martens’s June 23, 2014 Memorandum to EPA Administrator Gina McCarthy.

The documents that EPA reviewed in determining the eligibility of each of the proposed projects for funding through the CWSRF included the pertinent provisions of the Clean Water Act (CWA) and federal implementing regulations, as well as the New York-New Jersey Harbor Estuary Program (HEP) Final Comprehensive Conservation and Management Plan (CCMP), the New York-New Jersey Harbor Estuary Action Plan for 2011-2015 (Action Plan), and the Hudson-Raritan Estuary Comprehensive Restoration Plan (CRP) (collectively, the CCMP and supplemental documents).

As more fully explained below, EPA has concluded that five of the twelve Tappan Zee Bridge-related projects as proposed, totaling \$29.1 million, are eligible for CWA Section 320 project funding through the CWSRF and that seven of the twelve projects as proposed, totaling \$481.8 million, are not eligible for CWSRF funding. Accordingly, and for the reasons discussed below, the seven proposed projects deemed ineligible for CWSRF funding will be omitted from the Intended Use Plan (IUP). For those projects eligible for CWSRF funding, EPA will work to ensure that allocated grant funds are made available, as expeditiously as possible. Moreover, EPA remains available to meet with NYSDEC and NYSEFC to explore other opportunities to obtain and use available funding to improve water quality in New York in a manner consistent with the CWSRF.

Background

EPA is authorized to award capitalization grants to states for the purposes stated in the CWA, which include the establishment of a water pollution control revolving fund that provides assistance for, among other things, developing and implementing a conservation and management plan under CWA Section 320. (CWA §601(a)).

Federal CWSRF statutory and regulatory provisions require each state to prepare an annual IUP, which includes the state’s annual Project Priority List (PPL), as well as a list of CWA Section 212 projects, Section 319 activities, and Section 320 activities that the state considers to be eligible for assistance. (CWA §606(c) and §603(g), 40 CFR 35.3150(a) and 35.3115). The IUP may include estuary activities that implement an approved national estuary conservation and management plan under CWA Section 320 (CWA §603(c); 40 CFR 35.3115(c)). For those estuary activities that are eligible under CWA Section 320, the IUP must list the national estuary protection activities under CWA Section 320, if any,

that the state expects to fund from its SRF (40 CFR 35.3150(b)(1)(ii)), and the IUP must include information on the types of activities, including eligible categories of costs, to receive assistance. (40 CFR 35.3150(b)(3)). The IUP cannot include estuary-related activities that do not implement the CCMP under CWA Section 320.

The Amended and Restated Operating Agreement for the Organization and Administration of the New York State Clean Water State Revolving Fund between EPA and the NYSDEC (December 2006, most recently amended on April 3, 2013) (Operating Agreement) states that the NYSEFC shall develop the IUP and that the IUP shall be a part of the annual capitalization grant application. (Operating Agreement, Section 2(C)(i), p.6). A complete capitalization grant application includes the application forms, supporting documents, the IUP, and any proposed modifications to the Operating Agreement. (Section 2(D)(i), p.7). If, during EPA's review of the State's application, EPA determines that any part of the application is defective, EPA will deem the application incomplete.

EPA's Review of the Twelve Tappan Zee Bridge-related Projects

NYS states that each of the twelve proposed Tappan Zee Bridge-related projects will assist in the development and implementation of the CCMP, and therefore is an eligible CWA Section 320 activity qualified for financial assistance from the CWSRF under CWA Section 603(c)(3) and the implementing federal guidelines governing the CWSRF.¹ As noted above, in order for an estuary project to be eligible for CWSRF funding, it must be used to develop or implement a conservation and management plan developed pursuant to CWA Section 320. (CWA §603(c)(3)). EPA has determined that there is nothing in CWA Sections 601(a)(3), 603(c)(3), 320(b)(4) or the CCMP and supplemental documents to indicate that eligible projects include those that are intended to mitigate harms caused by major new construction projects within the estuary. These activities do not implement the CCMP and are not within the meaning of CWA Sections 601(a)(3), and 603(c)(3).

Summary of Projects Eligible for CWSRF Funding

After careful analysis of the twelve projects included within the Tappan Zee Bridge entry in the NYS final CWSRF IUP for Federal Fiscal Year (FFY) 2014, EPA has determined that five of the projects are eligible for CWSRF funding. These projects are as follows:

¹ NYSEFC letter to USEPA dated May 28, 2014, at page 1.

NYS Proposed Estuary Projects Eligible for CWSRF Funding		
NYS Proposed Project	EPA Determination of CCMP Link	NYS Projected Costs (millions)
Gay's Point Restoration	CCMP Actions H-7.3, H-12.5	\$ 1.4
Piermont Marsh Restoration	CCMP Actions H-4.4, H-12.5	\$ 0.8
Net Conservation Benefit Plan	CCMP Actions H-6.2, H-7.2	\$ 2.8
Stormwater Management Measures	CCMP Action NPS-2.0	\$14.4
Atlantic Sturgeon Outreach Program	CCMP Actions H-6.2, H-9.2	(included in Net Conservation Benefit Plan project)
Subtotal Project Costs		\$19.4
Nonconstruction Costs ²		\$ 9.7
Total Costs		\$29.1

These five projects are eligible because they are not tied to the bridge construction itself and are included as actions in the CCMP.

Summary of Projects Ineligible for CWSRF Funding

For the reasons discussed above, EPA has determined that seven of the projects proposed by New York State are ineligible for CWSRF funding and are not consistent with the authority for use of CWSRF funds under the CWA because they do not implement the CCMP and supplemental documents. With the exception of the shared use path, these projects are intended to mitigate harms caused by major new construction within the estuary, and therefore, they do not implement the CCMP. As discussed further below, EPA has also determined that the shared use path does not implement the CCMP. These projects are as follows:

NYS Proposed Estuary Projects Ineligible for CWSRF Funding	
NYS Proposed Project	NYS Projected Costs (millions)
Removal of Existing Bridge	\$ 65.0
Dredging for Construction Vessels	\$110.2
Armoring the Hudson River Bottom	\$ 29.9
Underwater Noise Attenuation System	\$ 48.0
Shared Use Path	\$ 66.7
Oyster Bed Restoration	\$ 1.2
Falcon Nest Box	\$ 0.1
Subtotal Project Costs	\$321.1
Nonconstruction Costs	\$160.7
Total Costs	\$481.8

² NY's total project costs for the twelve projects were calculated to be \$510.9 million, of which two-thirds of the costs are for construction costs (\$340.5 million) and one-third of the costs (\$170.4 million) are to cover expenses (nonconstruction costs) for "design and engineering, in house design support, legal (counsel, bond counsel, fiscal, etc.) and other potential expenses (contingencies – administrative)."

EPA's analysis is directed solely to the availability of CWSRF funding for the proposed projects and does not address the merits of any of the projects.

1. Removal of the Existing Bridge

Removal of the existing bridge is ineligible for CWSRF funding because it is intended to mitigate harms caused by major new construction within the estuary.

Although not determinative of the question of eligibility for CWSRF funding for the project, NYS asserts in its May 28, 2014 letter that the removal of the existing bridge would implement the CCMP because, among other things, it would:

- Reduce sediment scour and deposition, because structures in the water can alter local hydrodynamic conditions, creating both scouring and deposition, resulting in resuspended sediments as part of the natural sediment transport processes within the estuary, and removal of the existing bridge will thereby benefit habitat in the Hudson River.
- Remove a source of toxic contamination, lead-based paint.
- Remove a source of floatable debris.

We address New York's statements below.

Sediment scour, deposition and resuspension: This project must be viewed in the context of the overall replacement of the Tappan Zee Bridge. Even if it is correct that the existing bridge structures in the river cause sediment scour, deposition and resuspension, any decrease in these impacts as a result of the removal of the old bridge will be offset by the increased sediment scour, deposition and resuspension resulting from the presence of the new bridge structures.

Removal of the existing bridge will not improve habitat. The system will always be compromised due to routine dredging operations to preserve and maintain the navigation channels, and the presence of the barges to conduct the dredging. Additionally, while the substrate where the underwater structures are removed may eventually recolonize with benthos, the system will not be ecologically diverse due to the continuation of activities including regular maintenance dredging of the navigation channel. Moreover, removing existing structures will not minimize erosion or soil and water loadings of sediments and pollutants to the Harbor/Bight. On the contrary, due to sediment resuspension when the structure is removed, sediment loading rates will temporarily increase.

Lead-based paint: Although the original paint used on the Tappan Zee Bridge was a lead-based alkyd paint, there have been numerous painting contracts for the bridge over the years, including two to fully remove the paint. Therefore, the risk posed by the presence of lead-based paint has already been reduced. It is very unlikely that removing the current Tappan Zee Bridge will significantly reduce a source of lead contamination to the estuary.

Floatable debris: There is no support for New York State's assertion that CWSRF funding is appropriate for the management of floatable debris associated with the Tappan Zee Bridge demolition. The issue of floatables would only arise if NYS were to allow the existing bridge structures to deteriorate to the point where significant floatable materials are falling off and into the river. EPA is not aware of any evidence that the existing bridge structures are a significant source of floatable debris in the river.

The Management of Floatable Debris chapter of the CCMP does not encompass removing a bridge that, if abandoned for some extended period of time, could eventually deteriorate to the point where it is a significant active source of floatables to a water body. Rather, the CCMP provides the following examples of buoyant floatable debris:

Wood, beach litter, aquatic vegetation, and detritus; street litter (cans, bottles, polystyrene cups, sheet plastic, straws, and paper products); sewage-related wastes (condoms, sanitary napkins, tampon applicators, diaper liners, grease balls, tar balls, and fecal material); fishing gear (nets, floats, traps, and lines); and medical wastes (hypodermic needles, syringes, bandages, red bags, and enema bottles).

While NYS states that the potential floatables related to the bridge removal are comprised of “timber piles and floatable materials within the fender systems and maintenance docks,” this would obviously not include concrete and metal portions of the existing bridge. The speculative potential for incidental floatables does not mean that the entire bridge demolition would be eligible under the CWSRF.

2. Dredging and Mound Removal

Dredging and mound removal are ineligible for CWSRF funding because they are intended to mitigate harms caused by major new construction within the estuary.

Although not determinative of the question of eligibility for CWSRF funding for the project, NYS states that dredging and mound removal would implement the CCMP because, among other things, it would:

- Provide for ongoing coordinated and integrated efforts with various state and federal groups and dredged material task forces.
- Evaluate and implement, where practicable, alternative methods of dredged material disposal including those with beneficial uses, such as habitat restoration, landfill cover, etc.
- Restore and maintain a healthy and productive Harbor/Bight ecosystem, with no adverse ecological effects due to toxic contamination.
- Eliminate toxicity or bioaccumulation impacts on living resources by reducing contaminated sites, and manage risks to humans from seafood consumption.
- Reduce sediment hot spots, point and nonpoint sources of contaminants entering the Harbor, so that newly deposited sediments do not inhibit a healthy thriving ecosystem and can be dredged and beneficially re-used.
- Support a world-class port that is environmentally sustainable, economically sufficient and safe for commercial and recreational navigation.
- Achieve a quantity of sediments entering the Harbor system that supports the ecological health of the Estuary, including protection of shallow water habitats, such as oyster reefs, without excessively impairing navigational activities.

We address New York’s statements below.

EPA finds no nexus between New York’s assertions and the draft Management of Dredged Material Chapter of the CCMP. The chapter identified in-place contaminated sediments, continuing inputs of toxic chemicals, regulatory delays, and lack of non-ocean disposal options as the main contributors to dredged material management concerns in NY/NJ Harbor. The CCMP does not identify or recommend any dredging project(s), and certainly none in the area of the Tappan Zee Bridge.

For the purposes of our analysis, EPA will refer to the dredging and mound removal, both of which aim to remove river bottom sediment, collectively as dredging. With respect to the specific CCMP goals cited by the State in its May 28, 2014 letter, EPA offers these additional findings:

Coordinated and integrated efforts with federal agencies, state agencies and dredging task forces: Dredging for the new Tappan Zee Bridge and securing the necessary permits will not result in any new or unique coordinated or integrated efforts with federal groups, state groups or a dredged material management task force of the type cited in the CCMP.

Beneficial re-use of dredged material: In this project, there will be no beneficial re-use of dredged material. The upland disposal of dredged material associated with the rebuild of the Tappan Zee Bridge will occur at a previously permitted location and will not result in implementation of any new or innovative beneficial use alternatives as discussed and envisioned in the draft Management of Dredged Material chapter of the CCMP. The disposal will be conducted using standard dredging practices and procedures.

Restore and maintain a healthy and productive Harbor/Bight ecosystem: The dredging in the Tappan Zee Bridge project will not result in or contribute to restoring, preserving, maintaining or enhancing ecologically important habitats or an ecosystem that supports an optimum diversity of living resources, because the sediment being removed is not materially different from the sediments that will remain in place. Instead, dredging will remove all benthos in the dredging area, resulting in a decrease in both the quantity and diversity of benthic organisms. While we expect that the dredging areas may eventually recolonize with benthos, the system will likely remain ecologically stressed due to the continued disturbance associated with the maintenance of the new bridge.

Eliminate toxicity or bioaccumulation impacts on living resources by reducing contaminated sites and reduce sediment hot spots and point and nonpoint sources of contaminants entering the Harbor: The CCMP did not identify specific contaminated sites, nor has NYS demonstrated that removal of this dredged material will eliminate toxicity or bioaccumulation impacts on living resources in the area. Sediments in this portion of the Hudson River have not been identified as sites needing remediation. In fact, for each of the four dredging areas tested, results showed that the material was suitable for placement at the Historic Area Remediation Site (HARS) ocean disposal site, which is subject to very stringent standards.³ Furthermore, these recent sediment core data, which were submitted to EPA and the Army Corps of Engineers as part of the State's 2012 application for placement of dredged material at the HARS, showed the material to be all Class A. Class A material is "clean" for the purposes of disposal at the HARS. Many of the concentrations were at levels below the detection limits, and very few of the constituents detected were at levels significantly greater than the reference concentrations. Therefore, the dredging and mound removal for construction of the new Tappan Zee Bridge will not have a beneficial impact on the goal of maintaining a healthy and productive Harbor/Bight ecosystem.

Further, there is no demonstration that point and nonpoint sources of contaminants entering the Harbor will be reduced. The CCMP (Management of Toxic Contamination chapter) identifies point and nonpoint sources of contaminants as ongoing sources, including combined sewer overflows, stormwater,

³ Use of the HARS is restricted to dredged material suitable for use as the "Material for Remediation." That material is selected to ensure that it will not cause significant undesirable effects, including through bioaccumulation or unacceptable toxicity. (40 CFR 228.15(d)(6); 40 CFR 227.6.)

municipal point sources, atmospheric deposition. Dredging and mound removal will have no impact on these sources.

Support a world-class port: There is no nexus between the dredging and mound removal for the Tappan Zee Bridge project and supporting the Port of New York and New Jersey. The dredging is to support construction vessels and does not involve channel deepening or maintenance dredging required to maintain navigational channels for commercial or recreational vessels that will be using the port.

Achieve a quantity of sediments entering the Harbor system that supports the ecological health of the Estuary, including protection of shallow water habitats, such as oyster reefs, without excessively impairing navigational activities: See EPA's response above regarding the goal of eliminating toxicity or bioaccumulation impacts.

EPA further notes that when the CCMP was approved by the EPA Administrator in 1997, it was "with the agreement that the Dredged Material Management Chapter will be revised to reflect recent events, including the Administration's Plan." Memorandum from EPA Administrator Carol M. Browner to Jeanne Fox, Regional Administrator, USEPA Region 2, dated March 25, 1997. At the time of approval of the CCMP, the members of the Policy Committee were unable to reach agreement on the contents of this chapter, and the Clinton Administration had introduced legislation addressing dredging and the ocean disposal of dredged material, rendering the chapter immediately out of date. The entire Management of Dredged Material chapter in the CCMP contains a watermark stating "Revisions in Progress." Because the New York-New Jersey Harbor Estuary Program Policy Committee members were unable to reach agreement on HEP's role with regard to dredging and the disposal of dredged material, this chapter as written was not intended to be and was not implemented. It also has not been revised to date.

3. Shared Use Path

The Shared Use Path is ineligible for CWSRF funding because it does not implement the CCMP. NYS states that the Shared Use Path will offer pedestrians a place to rest and observe the Hudson River estuary while learning about the region's rich history and natural resources through informative signage. The State suggests that building the path will assist in implementing the CCMP by, among other things:

- Providing for public input to program and policy decision-making on behalf of diverse stakeholders in the Hudson/Raritan Estuary and the New York Bight.
- Maximizing public involvement in the implementation of the CCMP.
- Providing public access to the estuary with accessible routes to natural areas, enabling users to enjoy local scenic, natural, cultural, historic and recreational resources.

We address New York's statements below.

Place to rest and observe the estuary: The CCMP provides examples of a variety of recreational opportunities which would be eligible for CWSRF funding, but providing a place to rest and observe the estuary is not among those opportunities. This is not to say that shared use paths are not desirable – only that this shared use path is not eligible for funding under the CWSRF.

The CCMP and associated documents focus on public access as "physical and programmatic access to the Harbor's waters and to the water's edge." CCMP, p. 245 (Action E-2.5). The bike paths in

Westchester and Rockland Counties that the shared use path would connect are not close to either shore of the Hudson River and do not themselves provide access to the water or to the water's edge. The shared use path would connect these already-existing roadways and bicycle paths in Westchester County to those in Rockland County; it would not provide additional access to the estuary from either path.

Additionally, the shared use path would not provide other recreational opportunities in the estuary, such as fishing or boating, because the new bridge would be too high to allow for fishing or access to the water's edge for boating or other water-dependent activities. While users may be able to enjoy a scenic view and a place to rest on this bridge over the Hudson River, these are not activities that implement the CCMP and would not be eligible for CWSRF funding.

The CCMP acknowledges "the public demand for open space opportunities along the coastline," which could "build a constituency for enhanced protection of natural habitat and species populations." CCMP, p. 38. But the CCMP tempers that desire by stating that the benefits will be realized "with the right kind of space to accommodate different uses: places to fish, places to swim, places close to wildlife habitat for observation, safe places for boating including support facilities, and places to walk along the water." CCMP, p. 38. The CCMP also expressly provides for "Public Access Infrastructure" as an action item. CCMP, p. 39, Action H-8.3. Even here, however, the CCMP has a stated emphasis of promoting public use *of the waterfront*, not use of a bridge high over the water and removed from the waterfront.

Here, the shared use path does not provide a "place *close* to wildlife habitat for observation." A highly elevated path that goes over an estuary does not provide for close observation of wildlife.

In sum, providing distant scenic views that do not incorporate other access benefits is not included within or contemplated by the CCMP, and does not implement the CCMP.

Informative signage: The CCMP includes efforts to promote public education for habitat protection. CCMP, p. 39. Assuming that New York's inclusion of signage would implement the public education component of the CCMP, this would only render CWSRF funding available for the cost of the signage and not the significant infrastructure (the shared use path) upon which the signage would be placed.

Stakeholder input: Constructing a shared use path would not provide an opportunity for the public to interact with program stakeholders or to influence the program or policy decision-making. A path for walking or biking across the Hudson River would not provide individuals with access to program stakeholders or decision-makers, nor an opportunity to provide users to make their opinions and priorities known to program stakeholders and decision-makers.

Public involvement in implementation of the CCMP: Constructing a path for walking or biking would not "maximize public involvement in implementing the CCMP." See the discussion above.

4. River Bottom Armoring

River bottom armoring is ineligible for CWSRF funding because this activity is intended to mitigate harms caused by major new construction within the estuary.

Although not determinative of the question of eligibility for CWSRF funding for the project, NYS states that river bottom armoring would implement the CCMP because, among other things, it would:

- Reduce sediment resuspension.
- Improve water quality.
- Reduce biological impacts, physiological impacts and behavioral impacts to fish.
- Restore and maintain an ecosystem which supports an optimum diversity of living resources on a sustained basis.
- Preserve and restore ecologically important habitat and open space.
- Assist in the development and implementation of target ecosystem characteristics.

We address New York's statements below.

Reduce sediment resuspension and improve water quality: Prior to placing two feet of armoring, New York State will have already dredged to a depth of fourteen feet below the mean low water line. While the armoring material may eventually reduce sediment resuspension from propeller wash from the construction vessels, the armoring operations for the new Tappan Zee Bridge will temporarily resuspend sediments, thereby increasing sediments and loadings to the waters surrounding the project site, which will neither maintain nor restore water quality.

The document submitted by New York State to EPA entitled "*Water Quality Protection Elements of the New NY Bridge Project*" is silent on whether the armoring material will be removed when the construction and demolition is completed. If the rocks and sand are removed, there will be additional resuspension of sediments into the water column. If the rocks and sand are not removed, 107 acres of benthic habitat and forage areas for fish will be lost until reestablished, a process that will take years.

Reduce impacts to fish: Due to the river bottom armoring, fish will likely avoid the area. Those that remain will be negatively impacted by the armoring material because their forage areas will be reduced, since river bottom armoring will kill all of the benthos underneath the sand and rocks. Flora will be deprived of sunlight and will be unable to photosynthesize, and fauna will be deprived of oxygen and will suffocate. As a result, fewer sources of food will be available to the fish.

Preserve, restore and maintain habitat and open space: Armoring the river bottom will not restore, preserve or maintain ecologically important habitat or an ecosystem that supports an optimum diversity of living resources. It will take years for the benthic community to re-establish itself; placing sand and rocks along the bottom of the river will delay the recovery of the benthic community. Further, the re-established benthic community will likely be different than that which previously existed, due to the changed bottom habitat. During that timeframe, fewer forage areas will be available to fish and invertebrate populations, so a reduction in species diversity and abundance is likely.

Target ecosystem characteristics: River bottom armoring will not strengthen coordination and consistency on regulatory issues, watershed planning and dredged material management. River bottom armoring will not result in any new or unique coordinated or integrated efforts with federal groups, state groups or the dredged material management task force. There is no nexus between river bottom armoring and dredging windows, beneficial uses or identification of upland placement sites. Sedimentation control has been discussed above in the section entitled "Reduce Sediment Resuspension and Improve Water Quality."

It should also be noted that it is EPA Region 2 policy not to allow any EPA funds to be awarded under the authority of Section 320 of the Clean Water Act (National Estuary Program) for projects that involve the placement of fill into waters of the United States. The only exceptions to this regional policy are for

projects that create “Living Shorelines” or restore shellfish beds. For the last three years, all of the annual National Estuary Program grants awarded each year by the Region, including the HEP, have contained the following language *“No funding under this agreement shall be used to directly or indirectly support the placement of fill, pilings, or platforms in open waters, near shore waters, or wetlands to create artificial islands or serve as infrastructure for commercial development or new land for purposes other than habitat restoration.”* River bottom armoring is a fill activity since it involves placing stones and sand on the bottom of the Hudson River. Armoring the bottom of the Hudson River for the rebuild of the Tappan Zee Bridge does not comply with this Region 2 policy.

5. Underwater Noise Attenuation System

The underwater noise attenuation system is ineligible for CWSRF funding because it is intended to mitigate harms caused by major new construction impacting the estuary.

Although not determinative of the question of eligibility for CWSRF funding for the project, NYS states that the use of an underwater noise attenuation system would implement the CCMP because, among other things, it would:

- Restore and maintain an ecosystem which supports an optimum diversity of living resources on a sustained basis.
- Preserve and restore ecologically important habitat and open space.
- Minimize human disturbance of natural systems.

We address New York’s statements below.

The use of this system will not restore or maintain ecosystems, nor will it preserve and restore ecologically important habitat and open space. Its use will create, rather than minimize, disturbances to the preexisting natural systems. The noise attenuation system is designed to reduce short-term negative impacts associated with construction and will have no beneficial long-term effects on the ecosystem, the diversity of living resources or habitats, or in the reduction of pollutant loadings.

While the use of a noise attenuation system may have a short-term benefit for individual fish, its use in conjunction with bridge construction activities will not restore or maintain an ecosystem supporting an optimum diversity of living resources on a sustained basis, preserve or restore ecologically important habitat and open space, or minimize human disturbances of natural systems. While its use will likely reduce or mitigate the impacts from construction activities, for purposes of implementing the CCMP, current conditions with respect to ecosystem diversity, habitat quality and human disturbances will not be maintained or improved. The State asserts that the bubble curtains will isolate contaminant loads, but since they will not reduce contaminant loads, their use will not result in any preservation or restoration of ecologically important habitat and open space, preserve or restore ecologically important habitats or open space, or minimize human disturbances.

6. Oyster Bed Restoration

The oyster bed restoration project is ineligible for CWSRF funding because it is intended to mitigate harms caused by major new construction within the estuary.

Although not determinative of the question of eligibility for CWSRF funding, NYS states that the oyster bed restoration would implement the CCMP because, among other things, it would:

- Restore and maintain an ecosystem which supports an optimum diversity of living resources on a sustained basis.
- Preserve and restore ecologically important habitat and open space.
- Will implement the Target Ecosystem Characteristics (TECs) as defined by the Hudson-Raritan Estuary Comprehensive Restoration Plan (CRP), developed by the US Army Corps of Engineers and the Port Authority of New York and New Jersey in partnership with the HEP.

The oyster bed restoration is ineligible for CWSRF funding because it is direct mitigation for the harm caused by the bridge construction, specifically the dredging for the construction vessels. The oyster bed that is currently present in the vicinity of the bridge is being damaged by the dredging. But for the bridge construction dredging activity, the oyster beds would not be harmed and would not need to be restored elsewhere.

7. Falcon Nest Box Relocation

The falcon nest box relocation is ineligible for CWSRF funding because this activity mitigates a harm caused by major new construction within the estuary.

Although not determinative of the question of eligibility for CWSRF funding, NYS states that the relocation of the falcon nest would implement the CCMP because it would:

- Restore and maintain an ecosystem which supports an optimum diversity of living resources on a sustained basis.
- Preserve and restore ecologically important habitat and open space.
- Minimize human disturbance of natural habitats.
- Preserve, manage and enhance the Estuary's vital habitat, ecological function and biodiversity so that the Harbor is a system of diverse natural communities.

A pair of peregrine falcons, a New York State endangered species, have been nesting on the Tappan Zee Bridge in artificial nest boxes since 1988. To avoid the loss of this breeding pair from the local population, and as a condition of the NYSDEC permit authorizing the project, the nest boxes on the existing bridge will be moved to the replacement bridge upon its completion for peregrine falcons to utilize in future breeding seasons. The falcon nest box relocation is ineligible for CWSRF funding because it is direct mitigation for the harm caused by the bridge construction, specifically the removal of the existing bridge. But for the bridge construction activity, the falcon nest box would not be harmed, requiring that it be relocated elsewhere.

Conclusion

As set forth above, EPA has not found support in the CCMP or the supplemental documents for the funding of seven of the twelve bridge-related projects. Therefore, the seven ineligible projects cannot be funded from the CWSRF. In light of this determination, EPA is enclosing the FFY 2014 capitalization grant agreement, which is awarded, as modified, to NYSDEC.

EPA's determination of ineligibility of seven Tappan Zee Bridge-related projects applies to funds from the capitalization grant as well as to the recycled funds in the CWSRF. Therefore, if New York State

spends either capitalization grant funds or recycled funds toward projects that EPA has determined to be ineligible, EPA will disallow those costs.

The authority to approve CWSRF State Capitalization Grants has been delegated from the Administrator of EPA to the EPA Region 2 Regional Administrator who, in turn, has redelegated this authority to the Director of the EPA Region 2 Clean Water Division (Delegation of Authority – Clean Water Act 2-54. State Capitalization Grants, June 19, 2012).

The authorized representative may dispute this agency decision under 40 CFR 31.72 by electronically filing an appeal within thirty (30) calendar days of the date of this agency decision. The appeal must be transmitted via email to the EPA Disputes Decision Official, Richard Manna, at Manna.Richard@EPA.gov, with a copy to me at Matthews.Joan@EPA.gov within this 30 calendar day period, unless the EPA Disputes Decision Official grants NYSDEC an extension of time to file its appeal. Please note that NYSDEC must electronically submit a request for an extension along with sufficient justification prior to the expiration of the 30 calendar-day period for filing an appeal.

NYSDEC's appeal must include the following items:

- (1) An electronic copy of the disputed agency decision;
- (2) A detailed statement of the specific legal and factual grounds for the appeal including electronic copies of any supporting documents;
- (3) The specific remedy or relief it is seeking under the appeal; and
- (4) The name and contact information, including email address, of NYSDEC's designated point of contact for the appeal.

If the Disputes Decision Official does not receive an appeal that meets the above requirements within the 30 calendar-day period, or any extension of it, this agency decision becomes final.

As indicated above, the NYSDEC and the NYSEFC have played critical roles in using federal Clean Water Act funding from the EPA to support local governments' work to construct or upgrade sewage treatment plants. EPA appreciates this work and looks forward to working together to further improve water quality throughout the State of New York. EPA remains available to meet with NYSDEC and NYSEFC at your earliest convenience to explore opportunities to provide funding in ways that both the State of New York and EPA agree are beneficial to improving water quality throughout the State while remaining consistent with the requirements of the CWSRF.

Should you or your authorized representative have further questions regarding this decision please contact me at (212) 637-3724 or via email.

Sincerely,



Joan Leary Matthews

Director, EPA Region 2 Clean Water Division

Enclosure